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ABSTRACT

The Government in the Sunshine Act, passed by Congress in September 1976 to become effective in March 1977, will require many of the federal government's decision-making agencies to permit attendance by the press and public at agency meetings. This report details the provisions of the new law and comments on the effects it may have on the operations of agencies involved. Agency meetings; exemptions from the rule; enforcement of openness; "ex parte" contacts; impact of the new act on the press, the public, and the Freedom of Information Act; and the outlook for increased government openness are also discussed. (KS)

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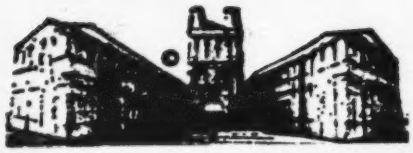

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FREEDOM OF INFORMATION CENTER REPORT NO. 366

GOVERNMENT IN THE SUNSHINE

This report was written by James T. O'Reilly, a Cincinnati attorney.

Introduction

If "sunlight is the best disinfectant", as the legendary Supreme Court Justice Louis Brandeis once said, then Government in the Sunshine might be just the cure for a government beset by public mistrust of its ability and integrity. The Government in the Sunshine Act, which passed the Congress in September, 1976, is the prescription which supporters believe can brighten the outlook for democracy in the system of federal administrative regulation.

The Government in the Sunshine Act, or simply "Sunshine" as it will be known, opens many of the federal government's decision-making agencies to the attendance of the press and public at agency meetings. The Act also prohibits off-the-record discussions of pending agency matters and revises the Freedom of Information Act's exemption for matters covered by specific confidentiality statutes. When the legislation goes into effect on March 12, 1977, it will complete a two-year trilogy of information-reform legislation which began with the 1974 amendments to the Freedom of Information Act (FOIA), continued with the Privacy Act's controls on file data concerning individuals, and culminated with Sunshine's passage on Sept. 13, 1976.[1]

Sunshine began as a Florida concept, lauded by the national press and transplanted into the federal bureaucracy through the efforts of Florida Sen. Lawton Chiles, Florida Reps. Dante Fascell and Claude Pepper, and New York openness advocate Rep. Bella Abzug. Although 49 statutes at the state level opened some state and local meetings to public attendance, Florida's innovative "Government in the Sunshine" law[2] was the first to legally presume all meetings to be open. Local and state bodies which wished to close meetings could not do so without making a strong case of exemption from the Sunshine requirements. The Florida concept, as supplemented and modified in the federal legislative process, has become the newest initiative toward openness in the federal system.

For those expecting "business as usual" at federal agencies after March 12, 1977, the federal Sunshine Act will be a double surprise. First, meetings held to make agency decisions and conducted by the members of a multi-member board or commission must be open and announced to the public. The Act is careful, perhaps overly careful in its complex final version, to avoid agency maneuvers which might close a meeting where the meeting's substance could affect or interest the public. Secondly, a person who has an interest in a case before an agency takes a risk of losing the entire case if the person or an agent makes an off-the-record approach to one of the agency decision-makers during the proceedings. Business will be more open, and more formal, as a result of the Sunshine requirements upon the administrative agencies.

Meetings

Government in the Sunshine begins with the premise that a federal agency must meet in public to do the public business, *if* (a) the agency decisions are made as a body by a multi-member board, usually Presidential appointees, and (b) the business to be conducted does not fall within a narrow range of ten exceptions. The agencies covered, about fifty in number,[3] include the National Labor Relations Board, Securities Exchange Commission, Federal Reserve Board, Federal Trade Commission, Tennessee Valley Authority, and the Board of Governors of the Postal Service. When these groups meet, or when delegated subunits such as a three-person panel meet to conduct agency business, a "meeting" within the Sunshine definition occurs if the discussion would "determine or result in joint conduct or disposition of agency business."

In the operation of Sunshine, the definition of a "meeting" is crucial to application of the Act's safeguards for public access. Routine discussions of daily business are permitted, and the coincidental presence of two or more agency members, e.g. in the audience at a speech given by a third member, does not trigger the "meeting" requirements. But such private decision-making as a pre-meeting meeting to dispose of sensitive issues is prohibited. Opponents of the final "meeting" definition won in the House on a narrow vote, 204-180, but the final definition was accepted after a conference with the Senate.[4] The

Summary:

The controversial federal Sunshine Act will finally become effective in March, 1977, after much debate and compromise. The author details provisions of the new law and comments on the effects it may have on the operations of agencies involved.

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House version focused on intent of the gathering to be a meeting, but the final language instead focuses upon the nature of the actual discussion conducted at any type of multi-member gathering, by whatever name. The House had also excluded those meetings which were held expressly for voting to close meetings in compliance with Sunshine procedural requirements, after opponents pointed out the absurd cycle which could result: to close a meeting, an agency would need an open meeting at which to discuss the future closing and the sensitive issues which provided justification for the decision whether to close the meeting at which a decision to close a third meeting would be made. Rep. Sikes of Florida decried "a legal nightmare that can keep government bogged down in an endless process of defending itself" from procedural-error challenges.[5]

If a meeting is open, adequate facilities for public observers must be provided in the meeting room, and minutes must be kept which are available to the public at minimal copying cost. If any agency wishes to close a portion of, or a full meeting, it must perform several procedural steps the absence of which can make the meeting vulnerable to legal attack:

1. At least one week in advance (except in emergencies), the agency must identify in advance its agenda of subjects to be discussed and the significance of the subjects to ten narrow categories of statutory exceptions.
2. Agency attorneys must determine whether the matters fit within the ten exceptions, and must prepare a justification with reasons why the exception(s) should apply.
3. Agency members vote by tally or by meeting, without proxies, to close all or a portion of the meeting, and the votes are made public.
4. The agency must make public, through mailing lists, bulletin boards, and by notice in the *Federal Register* when possible, details of time and place, portions to be closed, and an explanation for the closing. If outside persons attend the closed portions, their affiliations and names must be stated.[6]
5. For every closed meeting of an agency covered by the Act, a complete transcript of the closed portion must be made and retained for two years.

The agencies face a difficult set of procedural hurdles if they choose to close meetings. While some provision is made for closing certain meetings on a regular basis, rather than on an individual meeting-by-meeting basis, the agencies will be forced to think through any claims that their meetings should be closed—and to bear the burden in court of justifying that action.

Exemptions

Meetings can be closed to the public, and transcripts of closed meetings retained as confidential, if the agency has legal proof by a preponderance of the evidence that the matters to be discussed fall within ten categories:

1. National defense or foreign policy matters which are properly classified (similar to the amended FOIA exemption (b)(1);
2. Internal agency personnel matters;
3. Matters which are expressly required by law to be held confidential, or which are subject to withholding under specific criteria;
4. Confidential commercial or financial information, and trade secrets;
5. Accusations of criminal activity, or of censure, against a person (individual or corporate "persons" alike);[7]
6. Matters which if disclosed would be clearly unwarranted invasions of a person's privacy;
7. Law enforcement and criminal investigatory records (subject to the same narrow categories as FOIA exemption (b)(7);
8. Bank examiners' records;
9. Matters which if disclosed would generate financial speculation (added to protect the Federal Reserves Open Market Committee)[8] or which would frustrate agency action which has not been announced and will not be announced prior to the agency's action, i.e. not requiring public notice and comment; and
10. Matters which involve the agency's issuance of a subpoena or participation in hearings or other adjudication-related proceedings.

Of the exemptions, the ninth and tenth will be most controversial when invoked by agencies. The term "proceeding" was added at the Justice Department's request,[9] without explanation in the committee reports, and might be construed by agencies to block public attendance when the agency considers a proceeding which is being conducted by the agency itself—an end-run around openness. Real estate and other sensitive transactions will be protected by exemption 9.[10] Besides the literal guidance of the exemptions, Congress urged the agencies not to close meetings when "the public interest" would be served by public attendance.

Transcripts of the closed meetings will be kept, except for a few financial discussion meetings at which minutes will be kept.[11] As a result of debates and compromise at the committee level in the House, transcripts would have been permitted to carry only blank spaces for deletions; by a 232-168 vote, the House reinstated a requirement that explanations be provided in the deleted spaces to justify any deletions from the transcripts.[12]

Enforcing Openness

The press worked vigorously for the 1967 Freedom of Information Act out of frustration with the cavalier denials of access to documents by federal agency personnel. No provisions existed, until the Freedom of Information Act, for judicial review of the withholding decision. The proponents of Government in the Sunshine copied from the FOIA model in their establishment of judicial review of meeting-closing decisions. An injunction action can be filed to force a pending meeting to be open, or within sixty days after the closed meeting is held, a person can sue to force the agency to disclose the transcript.[13]

Judicial review of closed meetings proved to be a very controversial part of the House debate on "Sunshine," for two reasons. In the initial House bill, courts were permitted to give relief for violations which would include the voiding of agency action taken at improperly closed meetings. The FCC, for example, could face reversal in court of a license award if the decision awarding the license had been made in an unlawful meeting without any public

notice. Opponents argued successfully that the existing Administrative Procedure Act judicial review process gave "adequate authority . . . to inquire into matters governed by the new section." Rep. Abzug responded to critics with the clarification:[14]

> The bill before you does not allow a citizen plaintiff to nullify the substantive action taken at an unlawfully closed meeting. The most he can get is access to the transcript of the meeting and a court order prohibiting the agency from closing meetings on the grounds in question.

Because of the lengthy appellate process, it might be three to five years before definitive precedents under the Administrative Procedure Act establish the extent of judicial overturning of actions which were taken in violation of Sunshine procedures. The reversal of several agency-decided cases will undoubtedly stimulate close compliance with Sunshine. Experience and future oversight hearings will tell whether the punishment fits the crime.

The other major objection of opponents to Sunshine's judicial review process was to the granting of attorneys' fees and court costs to the person who sues an agency and "substantially prevails" in the suit. This was characterized as a "bonanza" for "certain professional litigators" in the consumerist movement. Rep. Collins of Texas said the bill "invites aggressive lawsuits from every lawyer who has time on his hands."[15] Proponents responded that enforcement would be lopsided in favor of special interests regulated by the agencies if only those with private funding could afford to enforce the Sunshine requirements.

Originally, the Sunshine bill had imposed personal financial liability for fees and costs upon the members of the agency which lost its case on a non-exempt transcript's defense. The House Judiciary Committee deleted the section because it is neither "desirable or even possible"[16] to attach personal consequences to members acting as a body in the scope of their official duties. In the final bill as enacted, costs and fees may be awarded by the court against the United States, or against a plaintiff whose suit was filed for "frivolous or dilatory" reasons. The Sunshine Act does not require a plaintiff to have legal "standing to sue"[17] but assessment of fees and costs should keep away the less sincere litigants.

Ex Parte Contacts

Agencies decide administrative law issues within their field of expertise by one of three methods: adjudication, formal rulemaking, and informal, or notice-and-comment, rulemaking. Under section 4 of Sunshine, which is not directly related to its open-meetings rules, those agency adjudications and rulemaking proceedings which require hearings under the Administrative Procedure Act[18] are subject for the first time to definite statutory restrictions against *ex parte* communications. Many agencies have regulations which prohibit off-the-record communications with the decision-making hearing official by one party without notice to the other party. These *ex parte* contacts are defined by Sunshine[19] to include oral or written contacts with the decision-making official or officials which relate to the substance of the proceedings and which are made without prior or contemporaneous notice to others concerned in the proceedings. Excluded from the prohibition are requests for status reports and requests for information by parties who are not interested or acting for an interested person, e.g. news media representatives inquiring for journalistic reasons.

It is significant that *ex parte* contact restrictions were attached to an open-meeting bill; the marriage indicates a comprehensive congressional desire to open the decision-making process more fully. Every federal agency, not only those covered by Sunshine's multi-member agency meeting rules, is subject to the *ex parte* restriction if it conducts hearings which are covered by the Administrative Procedure Act. Proponents in the House noted that the *ex parte* restrictions had been recommended by the American Bar Association in 1974[20] and that they were "not controversial." Public notice of the *ex parte* contacts could be embarrassing but sanctions were up to the agency itself to decide. Rep. Abzug played down the draconian nature of the extreme dismissal-on-merits sanction:[21]

> In an extraordinary instance, these could even include loss of the proceeding on the merits by the violator, but where the violator can demonstrate that the violation was inadvertent, the imposition of so drastic a sanction would be arbitrary and not proper.

Rep. Delbert Latta (R-Ohio), perhaps in error, attacked the *ex parte* rules as a restriction on the freedom of Congress to deal with constituents' problems at federal agencies. He cited the Privacy Act's experience of initially limiting release of constituent records from agency files. Co-sponsor Rep. Fascell responded:[22]

> Of course, the bill does not apply to personal matters at all, but to ex parte communications regarding quasi-judicial proceedings. One would not go to a judge and try to twist his arm in the middle of a lawsuit . . . We are talking about something in the nature of an adversary proceeding or a quasi-judicial proceeding. We are talking about contacting a person who would be involved in a decisionmaking process. We are not talking about agency staff or personal matters.

Since the *ex parte* prohibition has been incorporated into many agency regulations relating to hearing procedures, only a few should have difficulty in adapting their procedures to the new requirements. The difficulty will come with a lessening of informality in the discussion of cases between agency decision-makers and interested outsiders, and the consequent likelihood that a private-sector person unfamiliar with the new rules would violate the *ex parte* requirements. If the violation exhibits enough of the characteristics of *ex parte* contact abuses with which the law seeks to deal, that violating party's entire case may be dismissed or decided adversely. To avoid the prohibitions, persons involved in proceedings will have to be cautious. Prior or simultaneous notice to others involved in the case to avoid the stigma of a private *ex parte* approach may be the price of prudence.

Two ambiguous and troublesome aspects of the new restrictions involve the timing of the contact and the identification of persons protected from contacts. Restrictions apply after the persons interested in the outcome of a particular proceeding become "aware that notice of the hearings will be issued" by the agency. Prohibitions are

intended to apply "from the time the person gained such awareness,"[23] which in rumor-fed Washington circles may be an impossible time to determine. Another area of confusion will be the scope of the agency decision-maker category, since the stated intent is to cover agency members, administrative law judges, or any "other employee who is or may reasonably be expected to be involved in the agencys deliberations."[24] Consultants to an agency are covered so long as they are "employees" under contract or agreement to provide advice to the decision-maker; when they have given the advice and are not expected to serve further, they are no longer covered.[25] Each agency is invited to solve the ambiguities by listing those officials whose positions are to be covered.

The Sunshine philosophy holds that notice of a "secret" contact between an interested person and the decision-maker provides an adequate rebuttal opportunity to the opposing party. If an improper contact is made, the agency official must identify the contact and give its content on the public record of the case, so "the secret nature of the contact is effectively nullified,"[26] as press and public can review the open file. Agency attorneys advocating a case are not "decision-makers" but they too are subject to the prohibition against making intra-agency improper contacts. To complete the circle, an agency decision-maker who acts to seek the substantive views of an interested person must also put a notice of his contact into the public record of the proceeding.[27] Overall, whether abuses exist in fact has been somewhat speculative, but the system is comprehensive enough to cure any abuses which informality might have created in the past. Rigidity might be a result, but only experience will tell.

Impact on Press and Public

The press has not widely used the Freedom of Information Act remedies for non-disclosure because other sources have been available for the desired documents, without the delays and paperwork. The media have found the FOIA remedies to be effective in influencing agencies to favor release over withholding of documents. With Government in the Sunshine, the reporter gets a fast-acting and more certain remedy if agencies refuse the requested openness. If the reporter becomes reasonably familiar with Sunshine, an agency staff member's desire to close meetings to the press can be overrided by successfully indicating a failure to follow the closing procedure, a failure to give proper notice, or a failure to properly interpret the exemptions.

Better coverage will result, even as to closed meetings, due to public notices which will list the participants and their affiliations, the reason for closing, and an explanation for the closing. Later, after the meeting, a complete transcript will be available except for those portions which can be released only through agency persuasion or court action. The transcript and notice provisions, together with a new mandatory provision for retention of minutes of all open meetings, greatly ease the task of the reporter in following the agency decision-making process. The reporting of advisory committee meetings is also facilitated because the narrow exemptions of the Sunshine Act are applied to all advisory committee sessions by an amendment to the Advisory Committee Act.[28]

If litigation should occur to open a scheduled meeting, or to obtain a withheld transcript, the Sunshine provisions make fast court action more readily available than do even the amended FOIA's judicial review sections. The Act shortens the agency's time within which to respond to suits, and permits suits in Washington, or in the location where the agency is based or in which its meeting is held. A court may give temporary relief to a challenger of the closing by restraining the meeting, and could permit the meeting to proceed subject to later hearings on the propriety of the release or withholding of claimed-exempt sections of the transcript. If the plaintiff substantially prevails (by court order or agency compromise) the court can award the plaintiff costs of suit and attorneys' fees. The existence of several fee-award cases under the amended FOIA may stimulate reporters and their media management toward litigation to open closed meetings.

Impact on FOIA

One of the weaknesses of the Freedom of Information Act, in its initial form, was an unclear intent of Congress regarding the meaning of several exemptions. The congressional intent of Sunshine is very clear; governmental decision-making is to be open unless proven to fall under one of the narrow exemptions to be established by the agencies. Some of the exemptions continue the FOIA intent for balancing legitimate privacy interests, for example the protection of internal personnel discussions and a protection for confidential commercial information and trade secret matters. Overall, the intention toward openness of government action is explicit and reinforces that shown in the original and amended FOIA.

A rider was attached to Sunshine's open-meetings concept for the express purpose of overruling one Supreme Court interpretation of the FOIA's (b)(3) exemption. In *Administrator of FAA v. Robertson*,[29] the Supreme Court took a broad view of the language which exempted matters "specifically exempted by statute" from mandatory disclosure. In *Robertson*, the Civil Aeronautics Board withheld airworthiness reports from a Nader affiliate. At the Supreme Court, the CAB argued successfully that a statutory provision allowed the Administrator to withhold the documents. The Court held:

> Congress was aware . . . of the right of the public to information concerning the public business. . . . No distinction seems to have been made on the basis of the standards articulated in the exempting statute or on the degree of discretion which it vested in a particular government officer.

Within a year and a half after the ruling, proponents of broad disclosure changed the FOIA and explicitly stated in legislative history that the Congress intended to override *Robertson*. The Supreme Court had refused to narrow the types of substantive-statute confidentiality provisions which could be cited as a basis for exemption, so the Congress did so. The Sunshine Act's rider, an amendment to the FOIA, applies the (b)(3) exemption only to records of agencies:[30]

> specifically exempted by statute (other than section 552(b) of this title) provided that such statute (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for with-

holding or refers to particular types of matters to be withheld.

Likely to be made public as a result of this revision are CAB airworthiness reports, HEW reports on Medicare fund recipient institutions,[31] and possibly some agricultural reports which had been covered by statutes which had formerly enjoyed (b)(3) exemption.

Perhaps the strongest impact of Sunshine on the FOIA will come when courts consider the legislative intention of Congress in future FOIA cases. It is remarkable, perhaps even unprecedented that a statute less than ten years old should have six major Supreme Court interpretations and that the two which most favored withholding of documents—*EPA v. Mink* and *Robertson*— should have been explicitly overruled by the Congress. When an FOIA exemption claim appears to be a borderline matter of government secrecy versus public disclosure, in future court proceedings, it seems inevitable that courts reading legislative intentions should give the measure of advantage to pro-disclosure forces. Except where private interests are affected, interests whose protection of personal and commercial privacy was again protected in Sunshine, the balance will swing heavily in favor of public disclosure.

Finally, the Sunshine judicial review favors a tactic which courts under the FOIA had repeatedly rejected. The agency which denied access under FOIA and lost the case in court could, and did, refuse the same document or type of document to other requestors without effective judicial review. Sunshine provides that an improperly closed meeting can be enjoined by a court, and that the court can issue an injunction against all future agency closings which violate Sunshine procedures. This might be called the "one mistake rule," for future improper closings could evoke a contempt sanction from a federal court against the agency which lost the earlier dispute. The tactic might be accepted by courts under FOIA to bar future stretching of an FOIA exemption, such as (b)(5) for intra-agency memoranda, when future disclosure requests are received by the same agency.

The Outlook

Several predictions can be made for government openness after the passage of Government in the Sunshine:

—More agency decisions will be made in open, accessible forums. Though not all agencies are subject to open-meetings obligations, at least not for the next several years, every agency is subject to *ex parte* restrictions and every agency's advisory committee meetings are open unless the narrow Sunshine exemptions apply.

—Better decision-making members may be appointed to the agencies, as press and public are able to review the performance and competence of existing appointees. The level of debate and the knowledge of the subject matter under discussion are going to be under review by reporters who can, perhaps for the first time at some agencies, observe the deliberations which lead to agency policies.

—Agencies can be expected to try devious end-runs around the openness requirements, by regulation and in practice. The "meeting" definition, and the application of exemptions for legal proceedings matters or for the avoidance of frustrating agency action, will be construed narrowly by the courts. Some agency substantive decisions will be voided by the courts for procedural irregularity as a result of these agency attempts, and Sunshine's consequences will be controversial among those affected by the openness requirements. Although legitimate interests are still protected by exemption, Congress will not accept conduct which evades the openness principles of Sunshine.

The Chairman of the House Government Operations Committee, Rep. Jack Brooks (D-Texas.), well summarized the scope and goals of the Government in the Sunshine Act when he told the House members:[33]

> When Government actions are taken in secret behind closed doors, we not only undermine public confidence in Government, but we can wind up pretty far off target and without the public support our Government needs if it is going to stay in business . . . If the public understands and sees what goes on, it is more likely to accept and have confidence in our actions. Opening up those meetings will also assure that the officials of those agencies are accountable for their actions. Former President Harry Truman is justly noted for saying, "If you can't stand the heat, get out of the kitchen." I would add that if you cannot stand the light, get out of the Government.

FOOTNOTES

1. Each of the three related statutes appears in the section of the federal statutes with the 1946 Administrative Procedure Act. See 5 U.S.C. 552 (Freedom of Information), 552a (Privacy), and 552b (Government in the Sunshine).
2. Fla. Statutes, Chapter 286, provides a mandatory openness unless exempted; misdemeanor penalties for violation; injunctions against violations; and minutes for every meeting.
3. For a list of agencies, see House Report 94-880, Part 2, "Government in the Sunshine Act," House Committee on the Judiciary (1976) at 13.
4. 5 U.S.C. 552b(a)(2); see Cong. Record July 28, 1976, H 7889-90.
5. *Ibid.*, H 7883.
6. Several means are permitted but *Federal Register* publication is expected to be used to the greatest extent possible.
7. Counsel for the House Committee on Government Operations, Mr. Eric Hirschhorn, stated that the definition of crime would depend upon the sanction of the particular statute, e.g. in labor relations, and that the Administrative Procedure Act definition of "person" was applied in drafting this exemption. Conversation with author, Aug. 25, 1976.
8. The greatest lobbying effort on Sunshine, by the Federal Reserve, obtained this exception and thus legislatively overruled the recent openness precedent, *Merrill v. Federal Open Market Committee*, 413 F. Supp. 494 (D.C., 1976), despite consumer groups' opposition, see Cong. Record, July 28, 1976, H 7868-9.
9. Hirschhorn conversation, Aug. 25, 1976.
10. Rep. Abzug, Cong. Record July 28, 1976, H 7869.
11. Special provisions for Federal Reserve minutes, rather than transcripts, were added in conference committee as a compromise.
12. Inferences which could be drawn from deletion explanations will probably be minimized through agency practice and regulations, to alleviate the fears expressed by Sunshine opponents in debate.
13. The sixty-day statute of limitations runs from the time the meeting occurs or from the time its existence is announced afterwards.
14. Cong. Record, July 28, 1976, H 7895.
15. *Ibid.*, H 7878.
16. House Report 94-880, Part 2, at 7.
17. A requirement for legal standing as a prerequisite was proposed by Rep. McCloskey but was not adopted, Cong. Record, July 28, 1976, H 7876.
18. 5 U.S.C. 557 and 554.
19. 5 U.S.C. 551(14), as amended by Sunshine's Section 4(b).
20. Cong. Record, July 28, 1976, H 7865.
21. *Ibid.*, H 7868.
22. *Ibid.*, H 7869.
23. House Report 94-880, Part 1, House Committee on Government Operations, (1976) at 21.
24. *Ibid.*, at 20.
25. Hirschhorn conversation, Aug. 25, 1976.
26. House Report 94-880, Part 1, at 21.
27. 5 U.S.C. 557(d)(1)(C), as amended.

28. Federal Advisory Committee Act, section 10(d), as amended by Sunshine section 5(c).
29. 422 U.S. 255 (1975).
30. 5 U.S.C. 552(b)(3), as amended.
31. Statutes targeted for elimination by the conference committee include 42 U.S.C. 1306 (HEW) and 49 U.S.C. 1504 (CAB); Hirschhorn conversation, Aug. 25, 1976.
32. 410 U.S. 73 (1973).
33. Cong. Record, July 28, 1976, H 7878.

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